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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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KEVIN A. GEARHART,
Petitioner,
v.
ROSEMARY NDOH,
Respondent.

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Case No. [18-cv-06017-WHO](#) (PR)

**ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS;**

**ORDER DIRECTING PETITIONER
TO FILE A RESPONSE**

Dkt. No. 10

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INTRODUCTION

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Petitioner Kevin Gearhart seeks federal habeas relief from his state convictions. Respondent moves to dismiss the petition for such relief on grounds that the claims it contains are procedurally defaulted or unexhausted or both. (Dkt. No. 10.) Gearhart has not filed an opposition, even though he was granted additional time to file one. (Dkt. No. 12.)

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Respondent's motion is GRANTED. The procedurally defaulted claims are DISMISSED. Gearhart will be given time to exhaust his unexhausted claims, but he must comply with the instructions in this order. **On or before September 16, 2019, Gearhart must inform the Court in writing how he wishes to proceed.** If he fails to do so, this action will be dismissed for failure to prosecute.

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BACKGROUND

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In 2014, Gearhart was convicted in state court of committing sex crimes against children and received a sentence of 95 years to life in state prison. His attempts to overturn his convictions in state court were unsuccessful. This federal habeas petition

1 followed.

2 Gearhart raised two claims on direct review in state court, only one of which
3 appears in his federal habeas petition. The other claims he raises for federal review were
4 presented to the state supreme court by way of a habeas petition.

5 **DISCUSSION**

6 Gearhart raises six claims in his federal petition: (i) the admission of child sexual
7 abuse accommodation syndrome (CSAAS) evidence violated his right to due process;
8 (ii) his confession was coerced; (iii) the admission of evidence of prior bad acts violated
9 his right to due process; (iv) the prosecutor committed misconduct; (v) defense counsel
10 rendered ineffective assistance; and (vi) his accusers had a motive to testify falsely. (Pet.,
11 Dtk. No.1 at 5-6, 12.)

12 Respondent contends the claims are barred as unexhausted or procedurally
13 defaulted.

14 **i. Admission of CSAAS Evidence**

15 Gearhart claims the admission of CSAAS evidence violated his right to due process.
16 (Pet., Dkt. No. 1 at 5.) This claim was presented to the state supreme court by way of a
17 petition for direct review, but respondent contends the claim remains unexhausted,
18 Gearhart not having presented it to the state court as a federal claim. (Mot. to Dismiss
19 (MTD), Dkt. No. 10 at 9.)

20 Prisoners in state custody who wish to challenge collaterally in federal habeas
21 proceedings either the fact or length of their confinement are first required to exhaust state
22 judicial remedies, either on direct appeal or through collateral proceedings, by presenting
23 the highest state court available with a fair opportunity to rule on the merits of every claim
24 they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S.
25 509, 515-16 (1982). In fact, a federal district court may not grant the writ unless state
26 court remedies are exhausted or there is either “an absence of available state corrective
27 process” or such process has been “rendered ineffective.” *See* 28 U.S.C. § 2254(b)(1)(A)-
28 (B).

1 In support of his claim, Gearhart cited one federal case, *Frye v. United States*, 293
2 F. 1013 (1923) in his state petition. In *Frye*, the U.S. Supreme Court, acting on a direct
3 federal appeal, ruled that expert testimony on a “systolic blood pressure deception test”
4 was inadmissible because the test had “not yet gained such standing and scientific
5 recognition among physiological and psychological authorities” to justify admission of
6 testimony regarding it. *Id.* at 1014. The case does not cite to the Constitution or to any
7 constitutional theory.

8 Gearhart has not exhausted his claim, despite his citation to *Frye*. To exhaust a
9 claim for purposes of federal habeas review, it is not enough to merely present a claim to
10 the state’s highest court. A petitioner also must apprise the state’s highest court that he is
11 making a claim under the U.S. Constitution, and describe “both the operative facts and the
12 federal legal theory on which his claim is based so that the state courts have a ‘fair
13 opportunity’ to apply controlling legal principles to the facts bearing upon his
14 constitutional claim.” *Kelly v. Small*, 315 F.3d 1063, 1066 (9th Cir. 2003) (citations and
15 internal quotation marks omitted). Mere “general appeals to broad constitutional
16 principles, such as due process, equal protection, and the right to a fair trial,” do not
17 establish exhaustion. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citation
18 omitted). A “citation to either a federal or state case involving the legal standard for a
19 federal constitutional violation is sufficient to establish exhaustion.” *Castillo v.*
20 *McFadden*, 399 F.3d 993, 999 (9th Cir. 2005).

21 Respondent is correct that this claim was not exhausted. Gearhart’s citation to
22 *Frye*, a decision that does not in any way discuss the Constitution or federal law, does not
23 qualify as an announcement of a “federal legal theory.” He will be given an opportunity to
24 exhaust this claim.

25 **ii. Admission of Confession**

26 Gearhart claims the admission of his coerced confession at trial violated his
27 constitutional rights. (Pet., Dkt. No. 1 at 5.) This claim was not raised on direct appeal,
28 but rather by way of a habeas petition to the state supreme court, which denied the petition

1 with citations to *People v. Duvall*, 9 Cal. 4th 464, 474 (Cal. 1995); *In re Dixon*, 41 Cal. 3d
2 756, 759 (Cal. 1953); and *In re Swain*, 34 Cal. 2d 300, 304 (Cal. 1949).

3 Respondent contends the state court's citation to *Dixon* renders this claim
4 procedurally defaulted. (Dkt. No. 10 at 10.)

5 **a. Procedural Default Principles**

6 Federal habeas relief is not available if a claim is procedurally defaulted, that is, if a
7 state denied claims because a petitioner failed to comply with the state's requirements for
8 presenting claims. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). The state's
9 grounds for denying the claim "must be independent of the federal question and adequate
10 to support the judgment." *Id.* at 729. A state procedural bar is "adequate" if it is "clear,
11 consistently applied, and well-established at the time of the petitioner's purported default."
12 *Calderon v. U.S. Dist. Ct. (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Wells v.*
13 *Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994)).

14 The state carries the initial burden of adequately pleading "the existence of an
15 independent and adequate state procedural ground as an affirmative defense." *Bennett v.*
16 *Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). If the state meets this requirement, the burden
17 then shifts to the petitioner "to place that defense in issue," which the petitioner may do
18 "by asserting specific factual allegations that demonstrate the inadequacy of the state
19 procedure, including citation to authority demonstrating inconsistent application of the
20 rule." *Id.* If the petitioner meets this burden, "the ultimate burden" of proving the
21 adequacy of the state bar rests with the state, which must demonstrate "that the state
22 procedural rule has been regularly and consistently applied in habeas actions." *Id.*

23 To overcome a claim of procedural default, petitioner must establish either
24 (1) cause for the default, and prejudice, or (2) that failure to consider the defaulted claims
25 will result in a "fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262
26 (1989).

27 To show cause for a procedural default, the petitioner must "show that some
28 objective factor external to the defense impeded" his efforts to comply with the state

1 procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). For cause to exist, the
2 external impediment must have prevented the petitioner from raising the claim. *See*
3 *McClesky v. Zant*, 499 U.S. 467, 497 (1991).

4 To show prejudice, a petitioner bears “the burden of showing not merely that the
5 errors [complained of] constituted a possibility of prejudice, but that they worked to his
6 actual and substantial disadvantage, infecting his entire [proceeding] with errors of
7 constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing
8 *United States v. Frady*, 456 U.S. 152, 170 (1982)). If the petitioner fails to show cause, the
9 court need not consider whether the petitioner suffered actual prejudice. *Engle v. Isaac*,
10 456 U.S. 107, 134 n.43 (1982).

11 To show a “fundamental miscarriage of justice,” a petitioner must show that the
12 constitutional error of which he complains “has probably resulted in the conviction of one
13 who is actually innocent.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing
14 *Murray*, 477 U.S. at 496). “Actual innocence” is established when, in light of all the
15 evidence, “it is more likely than not that no reasonable juror would have convicted [the
16 petitioner].” *Id.* at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). “[A]ctual
17 innocence’ means factual innocence, not mere legal insufficiency.” *Id.* at 623. A
18 petitioner can make a showing of “actual innocence” by presenting the court with new
19 evidence which raises a sufficient doubt as “to undermine confidence in the result of the
20 trial.” *Schlup*, 513 U.S. at 324.

21 **b. Application of Procedural Default Principles**

22 Respondent is correct that this claim is procedurally defaulted. The state supreme
23 court cited *Dixon*, which bars from state habeas review those claims that could have been
24 raised on direct appeal. *Id.*, 41 Cal. 2d at 759. The U.S. Supreme Court has held that
25 California’s rule barring claims that could have been raised on direct appeal, as announced
26 in *In re Dixon*, is an adequate and independent state ground for the denial of habeas relief.
27 *Johnson v. Lee*, 136 S. Ct. 1802, 1806 (2016).

1 Now that the state has met its burden to adequately plead the existence of a valid
2 state procedural bar, it is Gearhart's burden to show cause and prejudice or that a
3 fundamental miscarriage of justice will result if the claim is not adjudicated on the merits.

4 Gearhart has not done so. In fact, he has made no contentions regarding procedural
5 default. He did not file an opposition to the dismissal motion, despite being given an
6 extension of time to file one. (Dkt. No. 12.) He did file a motion for an evidentiary
7 hearing, but it does not address procedural default. (Dkt. No. 13.) Gearhart therefore has
8 not shown cause or prejudice, nor has he shown that a failure to adjudicate the claim will
9 result in a fundamental carriage of justice. His claim regarding his allegedly coerced
10 confession is DISMISSED.

11 **iii. Admission of Prior Bad Acts**

12 Gearhart claims evidence of prior bad acts should not have been admitted at trial.
13 He contends the bad acts were “remote, dissimilar and unduly prejudicial” and their
14 admission made him appear “[g]uilty by association.” (Pet., Dkt. No. 1 at 5.) This claim
15 was not raised on direct appeal, but rather by way of habeas petition to the state supreme
16 court, which denied the petition with citations to *Dixon*, *Duvall*, and *Swain*.

17 Respondent correctly points out that the claim is procedurally defaulted. “Since the
18 claim is based on matters within the record, but was not raised on appeal, the *Dixon* bar
19 discussed in connection with petitioner’s second claim applies here as well.” (MTD, Dkt.
20 No. 10 at 10.)

21 As with the above claim, Gearhart has not shown cause or prejudice, or that a
22 failure to adjudicate the claim will result in a fundamental miscarriage of justice. His prior
23 bad acts claim is DISMISSED.

24 **iv. Prosecutorial Misconduct and Failure to Disclose Evidence**

25 Gearhart claims the prosecutor committed misconduct by “[i]mproper argument and
26 failure to disclose evidence during Pinecrest camping trip (8/2010) of altercation between
27 accusers and camper. Boys assaulted two people but denied action.” (Pet., Dkt. No. 1 at
28 6.) These claims were not raised on direct appeal, but rather by way of habeas petition to

1 the state supreme court, which denied the petition with citations to *Dixon*, *Duvall*, and
2 *Swain*. Respondent regards the first claim as procedurally defaulted and the second, which
3 appears to be a *Brady* claim rather than a misconduct claim, as unexhausted. (MTD, Dkt.
4 No. 10 at 11-12.)

5 **a. Prosecutorial Misconduct.**

6 Respondent correctly points out that the claim of prosecutorial misconduct is
7 procedurally defaulted under *Dixon*. “[S]ince such claim was based on matters within the
8 record on appeal, it could have been raised on appeal.” (MTD, Dkt. No. 10 at 11.)

9 As with the above claim, Gearhart has not shown cause or prejudice, or that a
10 failure to adjudicate the claim will result in a fundamental miscarriage of justice. His
11 prosecutorial misconduct claim is DISMISSED.

12 **b. Failure to Disclose**

13 The second claim — the failure to disclose the altercation — falls under *Brady v.*
14 *Maryland*, 373 U.S. 83 (1963),¹ rather than under prosecutorial misconduct. Respondent
15 correctly points out that the facts underlying this claim were not presented to the state
16 supreme court. (MTD, Dkt. No. 10 at 12.) The claim is therefore not exhausted. Gearhart
17 will be given an opportunity to exhaust this claim.

18 **v. Ineffective Assistance**

19 Gearhart contends counsel rendered ineffective assistance by waiving “opening stmt
20 [sic] denying allegations” and by failing to call witnesses. (Pet., Dkt. No. 1 at 6.) This
21 claim was not raised on direct appeal, but rather by way of habeas petition to the state
22 supreme court.

23 Respondent contends the claims are unexhausted, even though they appeared in
24 some form in the state habeas petition. Respondent’s argument unfolds as follows.
25 Because petitioner poorly articulated the facts in support of this claims, the state supreme
26 court “could not reasonably have understood what petitioner was claiming that counsel did

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28 ¹ Under *Brady*, the prosecution must disclose material evidence “favorable to an accused.”
Brady, 373 U.S. at 87.

1 nor did not do, or what the witnesses would have said that would have been exculpatory.”
2 (MTD, Dkt. No. 10 at 13.) The state supreme court’s citations to *Swain* and *Duvall*
3 support this conclusion. The page cited in *Swain* declares that the court’s ruling is “not a
4 ruling on the merits of the issues which petitioner has attempted to raise.” *Swain*, 34 Cal.
5 2d at 304. Similarly, the citation to *Duvall* indicates that the court denied the claim
6 because Gearhart either failed to state his claims with particularity or failed to provide
7 “reasonably available documentary evidence.” *Duvall*, 9 Cal. 4th at 474.

8 According to the Ninth Circuit, a state court’s citation to *Swain* and *Duvall* “means
9 that the California Supreme Court rejected” a petition as “insufficiently pleaded.” *Curiel*
10 *v. Miller*, 830 F.3d 864, 869 (9th Cir. 2016). When claims are rejected in that way, they
11 remain unexhausted. *Medley v. Runnels*, 506 F.3d 857, 869 (9th Cir. 2007).

12 These claims are unexhausted, as respondent contends. Gearhart will be given an
13 opportunity to exhaust them.

14 **vi. False Testimony**

15 Gearhart claims his accusers had a motive to testify falsely. (Pet., Dkt. No. 1 at 6.)
16 Respondent correctly points out that this claim was not presented to the state supreme
17 court at all and that it fails to articulate any federal basis for relief. (MTD, Dkt. No. 10 at
18 13.) Gearhart will be given an opportunity to exhaust this claim.

19 **CONCLUSION**

20 Respondent’s motion is GRANTED. (Dkt. No. 10.) Claims ii (admission of
21 confession), iii (admission of prior bad acts), and iv(a) (prosecutorial misconduct) are
22 DISMISSED.

23 Claims i (admission of CSAAS evidence), iv(b) (failure to disclose evidence), v
24 (ineffective assistance), and vi (motive to testify falsely) are unexhausted. **Gearhart has**
25 **two choices regarding his unexhausted claims.** He can opt to (1) dismiss the petition
26 and return to state court to exhaust the unexhausted claims, or (2) move to stay the petition,
27 exhaust the unexhausted claims and then move to amend the stayed petition to add the
28 exhausted claims. *See Ford v. Hubbard*, 305 F.3d 875, 882-86 (9th Cir. 2002), amended,

1 330 F.3d 1085 (9th Cir. 2003).

2 If he chooses option (1) (to dismiss this case and return later with a completely
3 exhausted petition), the new petition may be barred by the one-year statute of limitations
4 contained in 28 U.S.C. § 2244(d)(1). Time during which a properly filed application for
5 state collateral review (such as a state habeas petition) is pending is excluded from the one-
6 year time limit. *Id.* § 2244(d)(2). Gearhart is reminded that the time a federal petition,
7 such as this one, is pending is not excluded from the one-year limit. *Duncan v. Walker*,
8 121 S. Ct. 2120, 2129 (2001).

9 If he chooses option (2) (move to stay the petition here, exhaust the unexhausted
10 claims in state court and then move to amend his federal petition to add the exhausted
11 claims), he would be required to file a petition in the California Supreme Court within 60
12 days from the date of the order staying his federal suit, and then obtain a decision from the
13 California Supreme Court on his unexhausted claims. Gearhart would also be required to
14 notify this Court within thirty days of the California Supreme Court's final decision on his
15 unexhausted claims. In order to qualify for a stay, he must also show good cause for why
16 these claims were not previously exhausted and that they are "potentially meritorious"
17 under *Rhines v. Webber*, 544 U.S. 269 (2005).

18 **Gearhart must inform the Court of his choice in writing on or before**
19 **September 16, 2019. No extensions of time will be granted. Failure to inform the**
20 **Court of his choice by such date will result in the dismissal of the action for failure to**
21 **prosecute and without further notice to petitioner.**

22 The Clerk shall terminate all pending motions.

23 **IT IS SO ORDERED.**

24 **Dated:** August 7, 2019


WILLIAM H. ORRICK
United States District Judge